3-21-2012

Ida-Therm, LLC v. Bedrock Geothermal, LLC Appellant's Reply Brief Dckt. 39108

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDA-THERM, LLC,	)
	) SUPREME COURT NO. 39108-2011
Plaintiff-Counterdefendant-Appellant,	)
v.	)
BEDROCK GEOTHERMAL, LLC,	)
Defendant-Counterclaimant-Respondent,	)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County, Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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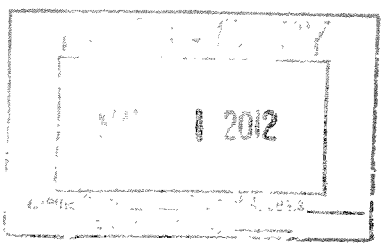

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I. I.C. § 42-4002(c)

"Geothermal resource" means the natural heat energy of the earth, the energy, in whatever form, which may be found in any position and at any depth below the surface of the earth present in, resulting from, or created by, or which may be extracted from such natural heat, and all minerals in solution or other products obtained from the material medium of any geothermal resource. Ground water having a temperature of two hundred twelve (212) degrees Fahrenheit or more in the bottom of a well shall be classified as a geothermal resource. Geothermal resources are found and hereby declared to be sui generis, being neither a mineral resource nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water and mineral resources in many instances.

Id.

ARGUMENT

II. DEED INTERPRETATION

A. Plain Meaning

Bedrock dismisses out of hand Idatherm's argument the 1946 Bell Deed did not include "geothermal resources" based on the plain and ordinary meaning of the language.

Both sides have conceded there is no ambiguity in the 1946 Bell Deed. The question before the court is a question of law. As such, it is not appropriate to look to the intent of the parties outside of the 1946 Bell Deed. "[I]ntent must be ascertained from the language of the deed as a matter of law without resort to extrinsic evidence." C&G Inc. v. Rule, 135 Idaho 763, 766, 25 P.3d 76, 80 (2001).

Yet, Bedrock is asking the Court to divine the intent of the parties to the 1946 Bell Deed by using "extrinsic" evidence. Bedrock also resorts to foreign cases to define the term mineral though such a definition is inconsistent with the Idaho Geothermal Resources Act which, ultimately, will determine whether or not the resource can be exploited.

Idatherm believes the court can and should interpret the 1946 Bell Deed from the "instrument itself." The 1946 Bell Deed does not reserve "geothermal resources." A simple reading provides the solution. If the parties intended geothermal resources to be included with minerals why not state such? The 1946 Bell Deed reserved only oil, gas and minerals.

Bedrock states such a position "begs the question of what 'mineral' means, without ever attempting to answer the question." Such a statement is not true. Idatherm offers an Idaho statute to define "mineral." Idatherm can show the intent under the 1946 Bell Deed was to reserve only minerals using both the Idaho statute and Bedrock's own authority to show that mineral is different from geothermal.

B. Minerals are Different than Geothermal

The cases cited by Bedrock support the position that minerals are not the same as "geothermal resources."

In fact, the cases cited by Bedrock, all define geothermal resources as "analogous" with or "closely related" to oil, gas, and minerals. Thus, recognizing they are different substances. Geothermal resources are not minerals.

"Analogous" is defined as follows:

> Derived from the Greek ana, up, and logos, ratio. Means bearing some resemblance or likeness that permits one to draw an analogy."

Black's Law Dictionary, 6th Edition (1990).

In Geothermal Kinetics, Inc. v. Union Oil Co. of Cal., 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (Ct. App. 1977), the court stated:"The production of the energy from geothermal energy is **analogous** to the production of energy from such minerals as coal, oil and natural gas...."

Id. at 881 (emphasis added).

In R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1076 (Utah 1997), the Utah Supreme Court quoted the Geothermal Kinetics case when stating, "energy from geothermal resources is **analogous** to the production of energy from such other mineral resources...." (Emphasis added).

In U.S. v. Union Oil Co., 549 F.2d 1271, 1279 (9th Cir. 1977) when comparing mineral, oil, gas and coal the Court notes that geothermal resources are "**more closely related"** to "such substances."

There is nothing in the 1946 Bell Deed that shows it was the intent to include geothermal within mineral. Geothermal is not defined as mineral under Idaho statute and is recognized as not being a mineral under the case law cited by Bedrock. Such a conclusion would require an extrinsic factual determination, and both sides agree the 1946 Bell Deed is not ambiguous.

C. Severance of the Surface from the Subsurface is not Appropriate

Because Geothermal is different than mineral, Bedrock argues vehemently for the Court to consider that a reservation of "mineral" severs the surface from the subsurface. Such a conclusion is not supported by conveyance language of the 1946 Bell Deed. It is also not supported by existing Idaho law.

This court has declared "[t]o determine the intent of the parties, the contract or other writing must be viewed as a whole and in its entirety." Daugharty v. Post Falls Highway Dist. 134 Idaho 731, 9 P.3d 534 (2000). It is for this reason that Stuki v. Parker, 108 Idaho 929, 703 P.2d 693 (1985) is so important. The Stuki court was asked to interpret a reservation in a Deed which reserved to the Grantors "all the phosphate and phosphate rock in the lands above described...." Id. at 694. In finding the reservation included more than just phosphate rock, the

Stuki court recognized the necessity of viewing all of the language in the deed in order to determine what was reserved. The conveyance language was deemed of critical importance.

In Stuki, the grantor conveyed "All the surface rights in and to and upon the [] described tract of land...." Id. After viewing all of the language[1] of the deed the court held:

> The correct interpretation of a deed which conveys the surface and then lists specific reservations is this: the reservations relate only to that which was first conveyed, the surface. Without a construction in this manner, the insertion of the word surface becomes meaningless and only the reservation is of any import. When the grantor conveys the surface he means just that-a conveyance of the surface, and to hold otherwise controverts the clear intention of the grantor.

Id. at 695.

Thus, every word of the 1946 Bell Deed is of importance particularly the conveyance language. For example, if the 1946 Bell Deed had reserved "all minerals" but made no mention of "oil" would the plain ordinary reading of the 1946 Bell Deed allow Idatherm to lease and then exploit and develop the oil on the subject property in dispute? The simple answer would be yes, as oil is not a mineral. However, under Bedrock's interpretation, the "mineral" reservation severs the surface from the sub-surface. Thus, Ida-Therm's oil lease would not be valid despite the fact that "oil" was not reserved by the grantors.

Such an interpretation renders the words oil and gas meaningless in the 1946 Bell Deed. Under Bedrock's theory the only word that is of any importance is the term "mineral." Again, "[t]o determine the intent of the parties, the contract or other writing must be viewed as a whole and in its entirety." Daugharty v. Post Falls Highway Dist., 134 Idaho 731, 9 P.3d 534 (2000).

[1] Deeds that convey mineral interests are subject to general rules governing contract interpretation including the rule that the deed will be construed against the grantor rather than against the grantee, because the grantor selects his or her own words. 53A Am, Jur. 2d, Mines and Minerals, § 185 (2012).

The importance of the conveyance language was not lost on the Stuki Court. It recognized ignoring the conveyance language rendered it "meaningless." The conveyance language in the 1946 Bell Deed must be considered. To not do so would render it "meaningless."

The 1946 Bell Deed conveyed:

> "*[A]ll the following described real estate...*" [legal description omitted] "*TOGETHER with...all estate, right, title and interest in and to said property as well as in law as in equity....*" *TO HAVE AND TO HOLD, all and singular, the above mentioned and described premises together with the appurtenances, unto the party of the second part, and to his heirs and assigns forever* [2]. *And the said parties of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, and his heirs and assigns against the said parties of the first part and their heirs and against all and every person and persons, whomsoever, lawfully claiming or to claim the same, and shall and will WARRANT and by these present forever DEFEND.*

R Vol. II, p. 229-230, Exhibit 1 (emphasis added).

Nothing in the conveyance language establishes the intent to sever the surface from the subsurface.

Bedrock tries to counter this position by arguing the word "surface" is used in the 1946 Bell Deed. When it states: "the first parties hereby reserve to themselves, and to their heirs and assigns, all the oil, gas and minerals, in, on, or under, the surface of said lands...." Id. What Bedrock fails to recognize is the use of the word "surface" is part of the *reservation* language and not the *conveyance* language. Bedrock's argument is the same as the grantees in Stuki and they make the exact same mistake. They only look at the reservation language and ignore the conveyance language.

[2] Union Pacific R. Co. v. Ethington Family Trust, 137 Idaho 435, 438, 50 P.3d 450, 453, (2002), "notable are the deeds' use of the term "forever," which is consistent with the conveyance of a fee simple...."

The Grantor in the Stuki case only conveyed the surface. Nothing in the 1946 Bell Deed shows the intent to convey only the surface, or to sever the surface from the subsurface.

In fact, Bedrock's own argument supports the position the surface was not to be severed from the subsurface by noting that the reservation in the 1946 Bell Deed specifically reserved the right to develop mineral rights, "in *on* or under the surface...." See Respondents' Brief pg. 6 lines 19-20. See also 1946 Bell Deed R, Vol. II, p. 229-230.

If, it was the intent to sever the surface from subsurface, why did the 1946 Bell Deed reserve the right to remove "oil, gas and minerals" not just "under" the surface but also the right to remove and develop those substances "on" the surface? The plain language of the 1946 Bell Deed does not establish the intent to sever the surface from the subsurface. Without the severance of the two estates Bedrock's theory that mineral includes geothermal must fail.

III. EVEN IF THE COURT DETERMINES THE 1946 BELL DEED SEVERED THE SURFACE AND SUBSURFACE, THE COURT SHOULD STILL FIND MINERAL DOES NOT INCLUDE GEOTHERMAL.

A. Bedrock's Authority Defining Mineral To Include Geothermal Is Not Persuasive.

In Idaho, a geothermal resource only has value and can only be exploited, if it qualifies under the Idaho Geothermal Resources Act. The act expressly states geothermal is not mineral. By this action, Bedrock attempts to do an end run around that definition by seeking adjudication inconsistent with the Act, but then can be presented to the department seeking the benefits of the very Act it is seeking to avoid.

Bedrock points to foreign authority to argue geothermal should be included in a "mineral reservation."

Bedrock cites four cases that dealt specifically with the issue of geothermal and minerals. A careful review of the cases cited by Bedrock show all four cases were decided well

after the 1946 Bell Deed. More importantly the cases cited were decided after the legislature of the State of Idaho defined geothermal to NOT be a mineral. I.C. § 42-4002(c).

Such, a position is interesting because Bedrock argues so forcefully that the Geothermal Resource Act is not applicable to the 1946 Bell Deed because it was enacted after 1946. Yet, Bedrock relies on case law also decided after 1946.

The cases cited by Bedrock are Geothermal Kinetics, Inc. v. Union Oil Co. of Cal., 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (Ct. App. 1977), R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1076 (Utah 1997), U.S. v. Union Oil Co., 549 F.2d 1271, 1279 (9th Cir. 1977), and Rosette Inc. v. United States, 277 F.3d 1272 (10th Cir. 2002).

Bedrock cites these cases while ignoring the fact that the State of Idaho had earlier concluded geothermal was not a mineral and was "sui generis."

The Idaho Geothermal Resource Act was enacted in 1972, five years before the earliest holding cited by Bedrock. By enacting the Geothermal Resource Act the Legislature recognized the need to move quickly on the issue of defining geothermal.

> The Legislature further finds that there is presently substantial interest in geothermal resources of this state that regulation in the public interest is imperative, and that regulation must take effect at an early date.

Idaho Session Laws, Ch. 301, (1972). If Bedrock is to have a valuable and exploitable interest in geothermal resource, it must have an interest which qualifies under the Act.

Bedrock argues the Idaho Geothermal Resource Act is not determinative in defining geothermal,[3] while relying on the definition of the courts of the Ninth Circuit, Utah and California. But, again, Bedrock's interest must qualify under the Act to have value. To qualify under the Act, Bedrock must satisfy the Act's definition.

[3] More fully explored below.

Bedrock itself admits it would be subject to the definition of the Geothermal Resource Act if it sought to develop geothermal resources on the property in question when it states: "[i]t is entirely consistent, however to conclude that as the owners of the rights to exploit geothermal resources underlying the property, the Bell heirs and their lessees must comply with the permitting and other regulatory requirements of the Geothermal Resource Act."

Bedrock is agreeing to be bound by the Geothermal Resource Act for everything except the definition of "geothermal resource." In fact, they do not even acknowledge the statute as persuasive in defining geothermal resources. This action is intended to supercede the statutory definition by obtaining an adjudication diametrically opposed to that definition.

Idatherm on the other hand believes the definition of geothermal resource as established by the Idaho legislature, (if not controlling) is at least more persuasive than foreign case law. Finally, Idatherm believes that if Bedrock seeks the rights and privileges of the Act, it must comply with and meet the statutory definition.

B. Treasure Valley Concrete, Inc. v. State Is Relevant.

Bedrock asserts Treasure Valley Concrete, Inc. v. State, 132 Idaho 673, 978 P.2d 233, is not relevant in deciding if a mineral reservation severs the surface from the subsurface; arguing the case involves the interpretation of a statute and is not relevant.

Yet, Bedrock cites as authority case law from foreign courts interpreting statutes to support its theory that a mineral reservation includes geothermal.

Evidently, statutory interpretation involving mineral reservations by this Court is irrelevant and not instructive but if the case is from the Ninth and Tenth Circuits (See U.S. v. Union Oil Co. 549 F.2d 1271, 1279 (1977) and Rosette Inc. v. United States, 277 F.3d 1222 (10th cir. 2002) and involve the interpretation of federal *statutes* they should be considered.

Bedrock cites the above cases to support its position and then observes, "although these cases involve the interpretation of a federal statute rather than a deed [t]he reasoning of the courts in these cases is applicable here...." Respondent Brief page 11 lines 1-3.

Yet for some reason this court's interpretation of a statute in Treasure Valley is not applicable? The court in Treasure Valley was asked to determine if a mineral reservation under a state statue included sand, gravel and pumice. The state in Treasure Valley, arguing as Appellant, contended (like Bedrock) that a reservation of "all...minerals of whatsoever kind or character requires the Court to define minerals broadly," and should therefore include pumice, sand and gravel. Treasure Valley Concrete v. State 132 Idaho 673, 676, 978 P.2d 233, 236 (1998).

The Treasure Valley Court decided the case by statutory construction finding "where an amendment is made it carries with it the presumption that the legislature intended the statute thus amended to have a meaning different than theretofore accorded it." Id.

The Treasure Valley Court, could have cited earlier case law and found as Bedrock argues, that a mineral reservation should be interpreted broadly. It did not. [4] Such is instructive for the case at hand and therefore relevant.

IV. TO REJECT THE DEFINITION OF I.C. § 42-4002 IS TO REJECT THE PLAIN MEANING OF THE STATUTE, CREATE CONFUSION AND IGNORE THE LEGISLATURE'S INTENT

Bedrock's main argument against the definition of "geothermal" as established by I.C.

[4] See Harris v. State of Idaho, 147 Idaho 401, 406, 210 P.3d 86, 91 (2009) wherein the Court stated, "the interpretation of pre-1986 I.C. § 47-701 and whether sand, gravel and pumice are included in that sections list of minerals presents a question of first impression before the Court and that other states have interpreted minerals in similar statutes to include sand, gravel and pumice. Therefore, until our decision in Treasure Valley Concrete, some question remained as to whether sand and gravel was a mineral under I.C. § 47-701, and the creation of the Mineral Lease between the State and Harris' simply represented opposing parties of conflicting interests entering into an agreement.

§ 42-4002(c) is based on what Bedrock calls the Act's "limiting language." Because I.C. § 42-4002 states "[w]henever used in this act..." Bedrock believes the definition of geothermal resources is limited and the policy is not relevant, but Bedrock acknowledges its interest has value only if recognized by the Act, because it would be bound to follow the Act if it wanted to develop or utilize a geothermal resource.

The problem with Bedrock's reasoning is four- fold. 1-Bedrock ignores the very rule of construction it is asking this Court to follow. 2-It ignores the fact such an interpretation would create legal confusion. 3- The legislature has shown through adoption of other statutes its intention that the Geothermal Resource Act define "geothermal resources" outside the Geothermal Resource Act. 4- Bedrock's interest only has value if recognized by the Act.

A. Statutory Construction

Bedrock argues the language "whenever used in this act...." prevents the Court from using the statutory definition and from reviewing the legislative history and policy behind the Act. In fact, neither Bedrock nor the District Court considered it persuasive.

Such a contention completely ignores the declaration of the statute itself. As Bedrock points out in its brief, "Statutes must be read to give effect to every word, clause and sentence." Hartley v. Miller-Stephan, 107 Idaho 688, 690 (1984).

To ignore then the policy behind the statute is to ignore the mandate of the statute itself and I.C. § 42-4014 mandates the following:

"Liberal Construction.-This act shall be construed liberally to serve its purposes and policy."

I.C. § 42-4014.

Thus, by mandate the policy of the Geothermal Resource Act must be reviewed and construed liberally. The same policy Bedrock declares is "irrelevant" the legislature says "shall"

be reviewed and must be "construed liberally." What then is the policy and purpose of the Act? From the Session laws (quoted at length for convenience) we can read the full enactment of the Geothermal Resource Act its purpose and its policy:

AN ACT

TO REGULATE THE DEVELOPMENT **AND USE** OF GEOTHERMAL RESOURCES; **MAKING LEGISLATIVE FINDINGS** AND STATING LEGISLATIVE PURPOSE AND POLICY; PROVIDING A SHORT TITLE; DEFINING TERMS; REQUIRING PERMITS FOR GEOTHERMAL RESOURCE WELLS, PRESCRIBING APPLICATION INFORMATION THEREFORE, AND A FILING FEE; GOVERNING AGENCY PROCEDURE IN RECEIVING AND REVIEWING PERMIT APPLICATIONS; ALLOWING AGENCY PROCEDURE FOR CONSOLIDATED PERMIT APPLICATION AND PERMIT EXEMPTIONS; STATING CONSIDERATIONS RELEVANT TO PERMIT APPLICATION APPROVAL OR DISAPPROVAL; PROVIDING A RIGHT TO A HEARING; ALLOWING PERMIT ISSUANCE AND REFUSALS AND A JUDICIAL APPEAL; PROVIDING FOR WATER RIGHTS APPLICATIONS WHERE NECESSARY; EXEMPTING CERTAIN EXISTING USES AND **PROVIDING THAT CERTAIN FUTURE USES BE REGULATED UNDER WATER LAWS**; REGULATING WELL ABANDONMENT; PROVIDING FOR GENERAL REGULATIONS; PROVIDING FOR WELL LOGS AND OTHER RECORDS AND REPORTS; GIVING THE DIRECTOR AUTHORITY TO SEEK JUDICIAL ENFORCEMENT; MAKING WILLFUL VIOLATION A MISDEMEANOR; PROVIDING FOR PERMIT AMENDMENTS; PROVIDING A RIGHT TO A HEARING ON AND JUDICIAL REVIEW OF AGENCY ORDERS; SAVING FROM PREEMPTION OTHER LAWS OF THE STATE AND RIGHTS OF INDIVIDUALS; PROVIDING FOR VOLUNTARY AND COMPULSORY UNIT OPERATION OF GEOTHERMAL AREAS; STATING GENERAL RULES OF STATUTORY CONSTRUCTION; PROVIDING SEVERABILITY; AND DECLARING AN EMERGENCY.
Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. It is hereby declared that the State of Idaho claims the right to regulate the **development and use of all of the geothermal resources within this state** and that geothermal resources are natural resources of limited quantity and of a unique value **to all of the people of the state**.

The legislature of the State of Idaho further declares that the **geothermal resources of this state** may provide an outstanding opportunity for enhancement of our economy and quality of life with a minimum of environmental degradation through a utilization of this energy source. It is also recognized that the process of utilization and development of our geothermal resources on a large scale may be associated with risks to the maximum sustained yield from these resources, risks to our valuable ground-water resources, and risks to the environment in the immediate locality of and around the installations at which such utilization is done.

The legislature further finds that there is presently substantial interest in the geothermal resources of this state that **regulation in the public interest** is imperative, and that **regulation must take effect at any early date.**

The legislature does therefore declare that it is the **policy and purpose of this state to maximize the benefits to the entire state** which may be **derived from the utilization of our geothermal resources**, while minimizing the detriments and costs of all kinds which could result from their utilization. This policy and purpose is embodied in this act which provides for the immediate regulation of geothermal resource exploration and development in the public interest.

Idaho Session Laws, Ch., 301 (1972) (Emphasis added).

"Liberally construing the policy," it is clear the legislature felt an emergency existed in 1972, such that it was necessary to regulate the development and use of "all" of the geothermal resources within this state. There is no exception for private resources in this declaration.

Further, the policy goes on to declare, "it is the policy and purpose of this state to maximize the benefits from the utilization of our geothermal resources...." Id.

Clearly then the policy of the act is to maximize the utilization of geothermal resources within the state. In order to do so geothermal resources must be defined. I.C. § 42-4002(c) does so and states unequivocally geothermal resources are not "mineral."

B. The Statutory Definition Does Not Retroactively Change A Pre-Existing Right

Bedrock argues the Act itself does not affect private conveyances. It argues to do so would retroactively affect a pre-existing contractual right. Such a position is contrary to the liberal construction required by the Act but also contains a logical fallacy. First, defining geothermal resource to not be "mineral" does not affect the contractual rights of the parties to the 1946 Bell Deed. The parties have what they have. What the court is being asked to do is interpret the intent of the 1946 Bell Deed language.

The question is one of law not fact. Bedrock, claims this Court should look to and follow the interpretation of the Ninth Circuit and other foreign jurisdictions to define mineral. Idatherm,

believes the court should follow the policy and statutory definition established under the Geothermal Resource Act to define mineral.

Applying the definition proposed by Bedrock based on case law as compared to the statutory definition of geothermal based on I.C. § 42-4002(c) is not a retroactive application of a "preexisting" contract right. They are legal interpretations. One is based on foreign case law. The other, the Idaho legislature. Thus, the argument that the application of the statutory definition would retroactively affect a pre-existing contract right and is unconstitutional is wrong.

C. Bedrock's Rejection of I.C. 42-4002 Would Create Legal Confusion

Bedrocks rejection of the definition of geothermal resources under the I.C. 42-4002 would create legal confusion in the implementation of the Geothermal Resource Act.

Bedrock puts a bubble over the statute (despite the policy to the contrary) by arguing it is not to be used in defining geothermal. If, the Court agrees and defines a mineral reservation to include geothermal, how is such an interpretation to be viewed by the Department of Water Resources when a permit is requested? If, the Department has conflicting applications, one based on a mineral reservation and the other based on the statute, which interpretation would the Director of the Department follow? The Department would be required by the Act to define geothermal as not a mineral. But what of a contrary adjudication?

If a permit were issued based on a mineral reservation could a private landowner whose surface right was being infringed sue asking for relief because the permit was issued based on a mineral reservation? Bedrock's posture would essentially create two separate definitions in the state of Idaho, something I.C. § 42-4002 avoids by defining geothermal.

Bedrock, tries to minimize this conflict by posturing that it must comply with the permitting and other regulatory requirements of the Geothermal Resource Act. Again, as mentioned earlier, how can you comply with the permitting requirements when you don't meet the statutory definitions?

In other words, Bedrock wants to have its cake and to eat too. It wants to reject the Act's definition of mineral as not being geothermal in resolving the 1946 Bell Deed mineral reservation, but wants to exercise the rights and privileges of the Act providing the definition? When Bedrock applies for a permit to develop its mineral reservation, does the resource it seeks to develop suddenly become subject to the Geothermal Resource Act, where before it wasn't? Of course not, the definition is set by statute and must be followed.

This is the very reason, Idatherm cited to the "unitizing" portion of the Geothermal Resource Act. See, I.C. § 42-4013. It was not because Idatherm's "lack of understanding of the subject" as suggested by Bedrock, but because in order to have forced integration a uniform definition applicable to all landowners would be required.

Could a landowner object to the integration or creation of a cooperative unit by claiming his neighbor's mineral rights are not geothermal, and thus he cannot be subject to unitization?

Such a position creates legal confusion. The legislature resolves the difficulty by declaring geothermal is neither mineral nor water, it is "sui generis."

D. I.C. § 42-226 and § 42-230 Establish the Broad Scope of the Geothermal Resource Act

I.C. § 42-4002 (c) defines Geothermal resource as:

> [T]the natural heat energy of the earth, the energy in whatever form, which may be found in any position and at any depth below the surface of the earth..." and the energy that can be extracted from "such natural heat and all minerals in solution or other

> products obtained from the material medium of any geothermal source. (emphasis added).

Id.

It other words, a geothermal resource is the *heat energy* that comes from the earth or the *heat energy* that can be extracted from a mineral solution or other medium. It is the medium which allows *the heat energy* to be extracted.

The legislature then specifically defines, states and declares that:

> Ground water having a temperature of two hundred twelve (212) degrees Fahrenheit or more in the bottom of a well shall be classified as a geothermal resource.

I.C. 42-4002 (c).

Thus, the legislature recognized that ground water, when it reaches a certain temperature (212 degrees) Fahrenheit becomes sufficient to allow the heat energy to be extracted from the medium (the groundwater).

The legislature "found" geothermal to be "closely related to and possibly affecting and affected by water and mineral resources in many instances." However, it was careful to have also "found" and "hereby declared to be sui generis, being neither a mineral resource nor a water resource...." Id.

Bedrock states that "[p]erplexingly, after asserting in its Complaint and arguing at length earlier in its briefing that geothermal resources are sui generis in all respects as a result of the definition contained in I.C. § 42 4002...Idatherm then inconsistently asserts that I.C. § 42-230 and § 42-226 applied together mean that all geothermal resources are ground water."

What Idatherm was trying to show was that by enacting I.C. § 42-226 and § 42-230 the legislature realized the Geothermal Resource Act was to be used to define all ground water over "212 degrees" Fahrenheit as a geothermal resource.

I.C. § 42-226 declares all thermal and groundwater to be property of the State. However, for geothermal purposes, I.C. § 42-230 yields to the Geothermal Resource Act to define when the "ground water" will become a geothermal resource and "shall be administered as a geothermal resource." Id. The Geothermal Resource Act recognized that a geothermal resource is closely related to and possibly affecting and affected by water and mineral resources be defined as "sui generis."

If, then as Bedrock argues, the definition of geothermal resources is confined solely to the Geothermal Resource Act why then does the legislature include the definition of Geothermal Resource to define all ground over 212 degrees Fahrenheit a geothermal resource? Clearly, the definition of geothermal resource is not confined to the "Act" as it covers and includes all groundwater within the state.

V. CONCLUSION

In conclusion, it is Bedrock that is actually asking the court to move away from the intention expressed in the 1946 Bell Deed and define mineral as severing the surface from the subsurface so as to exploit "every valuable substance."

Such an interpretation is vastly broader than the plain language of the 1946 Bell Deed, does not align with the conveyance language, creates legal confusion, and is not supported by case law, public policy, the Geothermal Resource Act, nor the broad inclusion of ground water as defined by Idaho Code.

DATED this 20th day of March, 2012.

PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP

Lance A. Loveland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March, 2012, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served upon the following person(s) in the following manner:

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X United States Mail
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